

State/Tribal Assumption of the CWA §404 Program

SEPTEMBER 2020



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Overview

- Assumption overview
 - Clean Water Act (CWA) §404 Assumption Authority - Statute and Regulations
 - EPA's role in CWA §404 Assumption
 - CWA §404 Assumption Criteria
 - EPA oversight
- Assumption Request
 - Review Process
- NHPA consultation
- Additional Information

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Assumption Authority

- CWA §404(g)
 - States/Tribes may assume administration of a CWA §404 program
- CWA §404(h) and 40 CFR part 233
 - Lists State/Tribal requirements
 - Lists EPA responsibilities: approval and oversight of an assumed program
 - Lists requirements and process for review and any modifications of State/Tribal programs

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CWA §404 Assumption Authority cont.

- CWA §404(h-l) and 40 CFR part 233 describe:
 - Requirements for State and Tribal program authority and program administration
 - Procedures EPA follows and criteria EPA applies in the approval and oversight of CWA §404(g) programs
 - Includes 404(b)(1) Guidelines, public notice and comment procedures, federal coordination
 - Process to request approval of State/Tribal 404 program – 120-day process, can be extended
 - Required contents of an assumption request package

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EPA's Role

- Prior to assumption
 - Work with States/Tribes to enhance capacity/capability and develop programs
 - Wetland Program Development Grants
- Evaluate and approve/disapprove State/Tribal assumption request
- Oversight of assumed program
 - Coordinate federal comments on non-waived permits
 - Review of modifications of State/Tribal program
 - Withdraw program approval, if needed

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CWA §404 Assumption Criteria

- State or Tribal programs must be:
 - consistent with and
 - no less stringent than the Act and implementing regulations
- State or Tribal programs must:
 - Have equivalent scope of jurisdiction*
 - Regulate at least the same activities
 - Provide for sufficient public notice and allow public participation
 - Ensure compliance with the CWA 404(b)(1) Guidelines
 - Have adequate enforcement authority

* State or Tribal program may have broader jurisdiction; however, the approved 404 program will have the same jurisdictional scope excluding waters retained by the USACE.

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EPA Oversight

State/Tribal Permit Process Once Assumed

- State/Tribe transmits to EPA notices of certain proposed projects, for which EPA has not waived its review (see following slide)
- EPA reviews notices, where federal review is not waived
 - EPA transmits notices to USACE, USFWS, & NMFS for input
- State shall not issue a permit to which EPA has objected or placed requirements for a permit condition, until EPA's concerns are addressed
- If EPA's objection is not resolved, permit is transferred to USACE

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EPA Oversight cont.

State/Tribal Permit Process Once Assumed cont.

Waiver of review:

- MOA with EPA identifies categories of projects for which EPA review is not waived
- EPA cannot waive review of:
 - Draft general permits
 - Discharges that may impact endangered species
 - Discharges that may adversely impact waters of another State or Tribe
 - Discharges with known or suspected toxic or hazardous pollutants
 - Discharges proximal to public water supply intakes
 - Discharges within critical State/Federal areas

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EPA Oversight cont.

Annual reports and consistency

- Program Annual Reporting
 - State/Tribe submits draft annual reports
 - Draft annual report made available for public review
- Ensures state program remains consistent with the CWA and implementing regulations
 - Ensure new statutory or regulatory requirements adopted by the State/Tribe
 - Review of any changes to the state program
- Periodic program review and evaluation
- Withdrawal of program approval (if necessary)

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Requirements of an Assumption Request

- Letter from State Governor or Tribal Leader
- Complete program description
- Attorney General (or equivalent official) statement
- MOA with EPA Regional Administrator
- MOA with the USACE
- All applicable State/Tribal statutes and regulations administering the program

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Complete Assumption Request Package

Program Description Includes:

- Scope and structure of program
 - Jurisdiction
 - Activities regulated
 - Anticipated coordination
 - Permit review criteria
 - Scope of permit exemptions
- Procedures for permitting, administrative review and judicial review
- Structure and organization of State/Tribe responsible for program administration
- Funding and staffing levels

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Complete Assumption Request Package

Program Description cont.

- Anticipated workload
- Copies of permit application forms, permit forms, and reporting forms
- Compliance evaluation and enforcement programs
- Clarification of waters under State/Tribal jurisdiction and those under USACE jurisdiction
- Best management practices proposed to satisfy farm, forest and temporary mining roads exemption provisions

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Complete Assumption Request Package

Statement from state independent legal counsel includes :

- Citations of specific statutes, administrative regulations and judicial reviews demonstrating adequate authority
- Legal analysis of the effect of State/Tribal laws regarding private property takings
- Certification of the authority of each State/Tribal agency to administer the program
- Analysis of any applicable state authority over Indian lands
 - Note, not assuming authority over Indian lands does not constitute partial assumption

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Complete Assumption Request Package

MOA with EPA Region 4 Administrator would include:

- Classes and categories of permits for which EPA waives federal review
- Provisions for State/Tribal reporting on program implementation
- EPA and State/Tribal roles and coordination regarding:
 - Compliance monitoring
 - Enforcement
- Provisions for modification of the MOA
 - Including transfer or withdrawal

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Complete Assumption Request Package

MOA with USACE would include:

- Description of waters of the U.S. over which USACE retains jurisdiction which are:
 - Waters presently used, or susceptible to use (either in natural condition or with reasonable improvement) as a means to transport interstate or foreign commerce and their adjacent wetlands.
 - *Tidal waters and their adjacent wetlands*
- Procedures for transfer of pending permit applications upon program approval
- Identification of any USACE general permits to be assumed by FL
 - Including a plan for transferring responsibility
 - Identification of current enforcement cases

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Assumption Request Review Process

- Assumption package submitted to EPA (received Aug 20, 2020)
 - 30-day EPA review for package completeness
 - Complete – State/Tribe notified;
 - Incomplete - package returned to State/Tribe
 - EPA has 120 days to approve or disapprove the State request* (Dec 17, 2020)
- Review period includes:
 - Notification to State/Tribe that package is complete (Aug 28, 2020)
 - Package sent to USACE, USFWS and NMFS ≤ 10 days (comments to EPA ≤ 90 days)
 - Public Notice, Hearings and Comment Period
 - Notice of assumption request published in Federal Register and newspapers (September 16, 2020)
 - Comment period 45+ days (ends November 2, 2020)
 - Public hearing 30+ days after Federal Register notice published (October 21st and 27th, 2020)

*State/Tribe and EPA can agree to an extension of the 120-day statutory timeframe for program review and approval.

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Assumption Request Review Process cont.

- Review period continued
 - Consultations
 - NHPA § 106 consultation (see next slide)
 - EO 13175 – Tribal consultation, as appropriate (discussed later)
 - ESA § 7 Consultation – if EPA determines there may be effects on federally listed species
 - 120-day review period may be extended by the State/Tribe and EPA
- Region 4 Administrator approves or disapproves assumption request
 - With EPA headquarters concurrence – Water, Enforcement and General Counsel
 - Upon approval, State/Tribe is notified and notice is published in the Federal Register
 - Responds to comments - in final Federal Register Notice; Sends direct response to USACE, USFWS and NMFS
 - If program is not approved, the State/Tribe is notified and provided a list of necessary revisions needed to obtain approval

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NHPA Consultation

EPA determined that approval of the State of Florida's request to assume the CWA Section 404 program constitutes a federal "undertaking" as defined by the NHPA.

Advisory Council on Historic Properties' (ACHP) regulations define "undertaking" - as:

"...a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval." (36 CFR 800.16(y))

Therefore, the EPA invited the ACHP, FDEP, the State Historic Preservation Officer (SHPO) and Indian tribes with historic interests in Florida to consult under section 106 of the NHPA, consistent with recommendations from the advisory council.

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Program Alternatives

Section 106 "Protection of Historic Properties," (36 CFR Part 800), offers program alternatives through which agencies can tailor the Section 106 review process for a group of undertakings or an entire program that may affect historic properties. The most common program alternative is a Programmatic Agreement.

Because the effects on historic properties cannot be fully determined prior to a potential approval of Florida's assumption of the 404 permitting program, 36 CFR 800.14(b)(1)(ii), EPA determined that a Programmatic Agreement was the best way to satisfy the NHPA requirements in the particular context of its review of Florida's program.

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Foundation of the Programmatic Agreement- Florida Operating Agreement

FDEP and the Florida SHPO entered into an operating agreement "Operating Agreement between the Florida Department of Environmental Protection and the Florida Division of Historical Resources -State Historic Preservation Officer regarding the State 404 Program" (hereinafter "OA"). The OA was submitted as part of the 404(g) assumption package and sets forth Florida's process for determining whether a project is likely to have an adverse effect on properties listed, or eligible for listing, on the National Register of Historic Places.

A copy of the final OA is available at: <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0640-0016>

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Florida Operating Agreement (Cont.)

The OA provides a detailed description of the historic properties review process if 404 assumption is approved, including but not limited to:

1. duties and responsibilities of FDEP and Florida SHPO
2. procedures for consultation and public notice
3. effects determination and resolution of adverse effects
4. unanticipated discovery procedures
5. Federal review
6. training requirements

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Programmatic Agreement

* The EPA contacted ACHP on August 24th and September 2nd and informed them that the EPA wanted to enter into a Programmatic Agreement to satisfy its NHPA requirement.

* EPA intends to adopt the OA as the foundation of the Programmatic Agreement and provided ACHP a copy of the OA on August 13th.

* Please let us know any issues or concerns with the process and language in the OA.

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Indian Tribe Consultation

The EPA has invited the following eight Federally recognized Indian tribes with interests in Florida to consult under the NHPA:

1. Seminole Tribe of Florida
2. Miccosukee Tribe of Indians of Florida
3. Poarch Band of Creek Indians
4. Muscogee (Creek) Nation
5. Alabama-Coushatta Tribe of Texas
6. Coushatta Tribe of Louisiana
7. Mississippi Band of Choctaw Indians, and
8. Choctaw Nation of Oklahoma.

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Points of contact for consultation

Mr. Kelly Laycock - (404) 562-9132 or laycock.kelly@epa.gov

Ms. Eve Zimmerman, Water Division Consultation - (404) 562-9259 or zimmerman.eve@epa.gov

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